FOIA Exemption 1 & E.O. 13526

Classified National Security Information

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Background

- May 27, 2009 - Presidential Memorandum, “Classified Information and Controlled Unclassified Information”
  - Directed a review of E.O. 12958, to include proposals concerning:
  i. Establishment of a National Declassification Center;
  ii. Effective measures to address the problem of over classification and increase accountability for classification decisions;
  iii. Facilitate greater sharing of classified information;
  iv. Prohibition of reclassification of material that has been declassified and released to the public under proper authority;
  v. Consideration of the electronic environment; and
  vi. Greater openness and transparency while also affording necessary protection to the Government's legitimate interests.

Presidential Actions of December 29, 2009

- Executive Order 13526, “Classified National Security Information”
- Presidential Memorandum, Implementation of the Executive Order, “Classified National Security Information”
- Administrative Order, “Original Classification Authority”

Presidential Memorandum

- Initial Implementation Efforts
  - Focus on foundational elements:
    - commitment of leadership, agency regulations, security education and training programs, self-inspection programs, and measures designed to hold personnel accountable.
  - Agency implementing regulations issued in final form within 180 days of the issuance of 32 C.F.R. Part 2001 by ISOO.
  - Updates from agencies to ISOO and periodic status reports issued by ISOO.
- Declassification of Records of Permanent Historical Value
  - Addresses 400+ M page backlog of materials previously subject to automatic declassification at NARA

Presidential Memorandum (continued)

- Delegation of Original Classification Authority
  - Shall be limited to the minimum necessary and only to those with a demonstrable and continuing need.
  - Review required with report to ISOO within 120 days of December 29, 2010 (April 28th).
- Promotion of New Technologies to Support Declassification
  - Directs the SecDef and DNI to support research to assist with cross-agency challenges associated with declassification.
- Possibility of a more fundamental transformation of the classification system.

Executive Order 13526 & the FOIA

- Exemption 1 of the FOIA protects from disclosure information that has been deemed classified “under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy” and is “in fact properly classified pursuant to such Executive Order.”

E.O. 13526 – Tier I (Information less than 25 years old)

- Under Section 1.4 of the Order, information shall not be considered for original classification unless its unauthorized disclosure could reasonably be expected to cause identifiable or describable damage to the national security, and it pertains to one or more of the following:
  a) Military plans, weapons, or operations;
  b) Foreign government information;
  c) Intelligence activities (including covert action), intelligence sources or methods, or cryptology;
  d) Foreign relations or foreign activities of the U.S., including confidential sources;
  e) Scientific, technological, or economic matters relating to the national security;

E.O. 13526 – Tier I (Continued)

f) U.S. Government programs for safeguarding nuclear materials or facilities;

g) Vulnerabilities or capabilities of systems, installations, infrastructures, projects, plans or protection services relating to the national security; or

h) The development, production or use of weapons of mass destruction.

E.O. 13526 – Tier II (Information more than 25 years old)

- Information which is of permanent historical value and more than 25 years old must meet one of nine criteria as described in Section 3.3(b) of the order to qualify for continued classification protection. To be exempt from automatic declassification, the release of the information should clearly and demonstrably be expected to:
  1) Reveal the identity of a confidential human source, a human intelligence source, a relationship with an intelligence or security service of a foreign government or international organization, or a nonhuman intelligence source; or impair the effectiveness of an intelligence method currently in use, available for use, or under development;
  2) Reveal information that would assist in the development, production or use of weapons of mass destruction;

E.O. 13526 – Tier II (Continued)

3) Reveal information that would impair U.S. cryptologic systems or activities;
4) Reveal information that would impair the application of state of the art technology within a U.S. weapon system;
5) Reveal formally named or numbered U.S. military war plans that remain in effect, or reveal operational or tactical elements of prior plans that are contained in such active plans;
6) Reveal information, including foreign government information, that would cause serious harm to relations between the U.S. and a foreign government, or to ongoing diplomatic activities of the U.S.;
7) Reveal information that would impair the current ability of U.S. Government officials to protect the President, Vice President, and other protectees for whom protection services , in the interest of national security, are authorized;

E.O. 13526 – Tier II (Continued)

8) Reveal information that would seriously impair current national security emergency preparedness plans or reveal current vulnerabilities of systems, installations, infrastructures relating to the national security; or
9) Violate a statute, treaty or international agreement.

Special Considerations Regarding FOIA

- Classification/Reclassification after a FOIA request is received. **Section 1.7(d)**
- Classification by compilation. **Section 1.7(e)**
- Glomar. **Section 3.6(a) & (b)**

Resources

- Executive Order 13526, “Classified National Security Information”
  - http://www.archives.gov/isoo/pdf/cnsi-eo.pdf
- 32 CFR Parts 2001 and 2003, “Classified National Security Information Final Rule”
  - http://www.archives.gov/isoo/policy-documents/isoo-implementing-directive.pdf
- Presidential Memorandum, Implementation of the Executive Order, “Classified National Security Information”
  - http://www.archives.gov/isoo/pdf/implementing-memo.pdf
- Administrative Order, “Original Classification Authority”
  - http://www.archives.gov/isoo/pdf/oca.pdf